IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 205 OF 2005

IN

EXECUTION APPLICATION NO.237/2000

IN

SUIT NO.258/1994

Virendra Shamjibhai Gala ... Plaintiff

Vs.

M/s Tulsi Construction

& Associates & Ors. .... Defts.

C.Balsara with Mr. Gala i/b M/s Harachandra for plaintiffs.

Advocate V.Y. Sanglikar with R.P. Singh for defendant nos. 1 and 2.

CORAM: S.U.KAMDAR,J.

DATE :3/5/2005.

P.C.:

1. The present chamber summons is taken out by the defendant inter alia seeking that the Execution

Application No.237/2000 be dismissed and the attachment levied on the movable and immovable properties of defendant nos. 1 to 5 and 9 to 12 on 19th January 2005 be raised. There are various other reliefs which are sought in the Chamber summons which are not relevant for the purpose of the determination of the main reliefs which is in terms of prayer clause (a) and (b). This proceedings have chequered history and both the parties to the suit are abusing the process of law and are busy in settling the score with each other.

2. Original suit being Suit No. 258/94 was settled by and between the parties by consent terms dated 4th March 1996. Under clause 2 of the terms and conditions of the consent terms , it was inter alia provided that agreem,ent for purchase of the residential flat of the carpet area of 715 sq.ft situated at Vijaykarwadi, Anand Road, Malad(W) is valid , subsisting and binding on the parties.

3. Under the Clause 5 of the consent terms it was

provided that instead of the said flat of 715 sq.ft of carpet area commercial permanent alternate accommodation of the carpet area of 640 sq ft comprised in two offices Nos. 8 and 11 will be given as shown in the approved plan.

4. Under Clause 6 of the consent terms it was provided that the defendants undertake to this Court that he will commence the construction of the said building as per the approved building plan within the period of 7 days from the date of revised commencement certificate issued by the Corporation and complete the construction within a period of 9 months from the date of revised commencement certificate issued by the Corporation.

5. Under the clause 8 of the terms and conditions it was provided that the defendants to hand over to plaintiff vacant and peaceful possession of the permanent alternate accommodation on what is known as ownership basis free from all encroachers within a period of 9 moths from the date of commencement certificate which will be issued by the Corporation.

6. Under clause 20 and 21 of the consent terms which are the subject matter of the dispute between the parties are reciprocal obligations by and between both the plaintiff and the defendants. Clause 20 and 21 is composite arrangement arrived at by and between the parties. Clause 20 contemplates that in the event if defendant commits default in handing over vacant and peaceful possession of the accommodation, as contemplated in clause 8 above, then in that event defendant will be liable to pay to plaintiff sum of Rs.3000/- per day as the penalty and liquidated damages for delay in handing over possession of the said premises. Simultaneously under Clause 21 it is provided that in the event if plaintiff commits default in handing over possession of the tenanted premises which is in his use and occupation within a period of 30 days from date defendant offered possession of the said permanent alternate accommodation , then in that event from the date of expiry of period of 30 days of such intimation, the plaintiff shall liable to pay to the defendant a sum of Rs.3000/- per day as liquidated damages for delay in handing over possession of the said tenanted premises . Clause 20 and 21 of the said consent terms which are relevant for the purpose of the said

chamber summons are reproduced hereunder;

CLAUSE 20: ORDERED that in the event if the Defendants commit default in handing over the vacant and peaceful possession of the said permanent alternate accommodation within the stipulated time as provided in clause (8) hereof then and in that event without prejudice to the other rights of the plaintiff under these Consent Terms, the defendants shall be liable to pay to the plaintiff a sum of Rs.3,000/- per day as penalty and liquidated damages for delay in handing over possession of the said permanent alternate accommodation by the Defendants to the plaintiff for the period from the date of the expire of the said stipulated period till the possession of the said permanent alternate accommodation is handed over to the plaintiff which amount calculated at the rate of Rs.3000/- per day shall be recoverable by the plaintiff from the defendants and the defendants agree and undertake to pay the same to the plaintiff.

CLAUSE 21: ORDERED that in the event if the plaintiff commits default in handing over quiet,

vacant and peaceful possession of the tenanted premises in plaintiff's use and occupation within a period of 30 days from the date of defendants after possession of the said permanent alternate accommodation as per these consent terms then and in that event from the date of expire of the said period of 30 days of such intimation the plaintiff shall pay to the defendants a sum of Rs.3000/- per day as liquidated damages for delay in handing over the possession of the said tenanted premises by the plaintiffs to the defendants and which amounts calculated at the rate of RPS.3000/- per day shall be recoverable by teh defendants from the plaintiff and the plaintiff agrees and undertakes to pay the same to the defendants.

7. It seems that there were defaults on the part of plaintiffs in handing over possession of tenanted premises. There were consequently also defaults on the part of the defendants in handing over permanent alternate accommodation to the plaintiff. In view thereof the notice of Motion was taken out by the plaintiff in the present suit being Notion of Motion

No. --/99 which was heard by (Shah J.) on 27/9/99. The Learned single Judge by taking overallview of the matter resolved the dispute between the parties by holding that there is a mistake in the occupancy certificate issued by the concerned authorities and that necessary corrections can be carried out by the concerned authorities. The learned single judge (Shah J.) also recorded the undertaking given by the defendants that he shall abide by the terms and conditions of the occupancy certificate. Under the said order plaintiff was given liberty to take possession against vacating the existing tenanted premises which was in his possession and handing over the same to defendants. Period for handing over possession was extended by four weeks. The said order dated 27.9.99 being most relevant . The relevant part is reproduced hereunder:

> "It seems that through mistake part occupancy certificate has been issued by the concerned authority in the name of deceased G.R. Vijaykar. Parties have already applied to the

authority for necessary corrections in the certificate. The concerned authority is directed to effect the necessary correction in the certificate in question."

Defendants undertake to comply with the conditions mentioned in the part occupancy certificate.

Plaintiff is at liberty to take possession of the suit premises against vacating the existing premises and handing over the same to the defendants. The period to hand over possession is extended by four weeks."

8. After the order dated 27.9.99 has been complied with and both the parties having handed over possession to each other, decree for liquidated

damages was sought to be executed by the plaintiff by taking out chamber summons No.595/03. The said Chamber summons was taken out on the ground that the decree is executable for recovery of liquidated damages and in execution thereof plaintiff applied for appointment of Court Receiver, High Court, Bombay. The said chamber summons was heard by the learned single Judge of this Court (Dharmadhikari,J) and by an order dated 7.7.04 the said chamber summons was dismissed. While dismissing the same, the learned single Judge (Dharmadhikari, J.) has given his finding that the plaintiff is not entitled to claim liquidated damages in view of order passed by the learned single Judge (Shah J.) dated 27.9.99 . It was held that the dispute as to handing over the possession by and between the parties has been finally settled by the learned single Judge (Shah J) by his order dated 27.9.99 and thus, it is not permissible for plaintiff to contend that the defendant in breach of the said consent terms by delay in handing over possession of the said premises and thus, entitled to execute decree for liquidated damages. Even on merits the learned single Judge (Dharmadhikari J) has held that there is no breach of terms and conditions of the consent terms on the part

of the defendant and assuming that there was any breach , but the same stood waived by order dated 27.9.99 passed by learned single Judge (Shah,J.) . After the said order is passed and chamber summons is dismissed, plaintiff has preferred an Appeal before Division Bench. The Division Bench by order dated 24.8.04 has dismissed the Appeal holding that they did not see any reason for interfering with the order passed by the learned single Judge. However, they have clarified that the observations in the order concerned must be confined to the disposal and shall not influence consideration of execution application No.237/2000.

9. Taking benefit of the said clarification the plaintiff has now executed a decree in Execution Application No. 237/2000 for the very same claim of liquidated damages. Pursuant to the said execution of the decree properties movable and immovable of defendant Nos. 1 to 5 and 9 to 10 has been attached by an attachment dated 19th January and accordingly present chamber summons has been taken out by the defendant for the aforesaid reliefs.

10. It will not be out of place to set out certain

additional circumstances which has transpired in the present proceedings. The defendants in the present case also sought to execute a decree for the claim for liquidated damages under Clause 21 which provided for payment of liquidated damages to him for not handing over possession of the tenented premises to him within time prescribed therein. The said execution application was resisted by plaintiff by taking out chamber summons being Chamber summons No.497/2005. I had heard the said Chamber Summons. and by my order dated 12/4/05 I held that defendant is not entitled to execute a decree by virtue of orders passed by the two learned single Judges in the aforesaid proceedings. I had taken a view in the said order dated 12/4/05 that the claim for liquidated damages in favour of the defendant does not survive by virtue of the fact that dispute between the parties stood settled by order dated 27.9.99 of learned single Judge (Shah,J.) and after taking the aforesaid view, I allowed the chamber summons taken out by the plaintiff being Chamber summons No.497/05 and Execution Application lodged by the defendants for executing decree for liquidated damages was dismissed.

11. Now that the plaintiffs are seeking to execute the very same decree for claiming liquidated damages under Clause 20 in their favour and consequently have attached articles belonging to the defendants, in execution thereof, plaintiffs have taken out the chamber summons for raising of attachment and for dismissal of Execution Application No. 237/2000.

12. I have heard the parties at length. I have taken up the chamber summons for hearing and final disposal because both the parties to the chamber summons requested me to dispose off the same as I had done in the case of chamber summons no. 497/05 by my earlier order dated 12.4.05. In view of the request made by both the parties to hear the chamber summons, I have heard the parties at length.

13. In my opinion the chamber summons is not only misconceived but wholly frivolous and abuse of process of law for following reasons.

14. FIRSTLY the disputes in delay of handing over the possession of the premises was amicably settled

by the learned single Judge by an order dated 27.9.99 (Shah,J). The Judge provided for simultaneous handing over of the possession of the premises by both parties. and took undertaking from the defendants that the occupancy certificate will be rectified and that he will comply with all the conditions mentioned in the certificate. Time to hand over the possession is also extended by four weeks. Thus, by reading the order of the learned single Judge (Shah J) it is clear that the dispute in handing over the possession of the premises stood finally concluded and both the parties accepted the possession of the premises without reserving any claim for any liquidated damages as contemplated either under clause 20 or clause 21 of the consent terms.

15. SECONDLY on the identical argument that there is breach of consent terms and plaintiff is entitled to liquidated damages earlier chamber summons was moved by plaintiff being Chamber summons No. 595/03. The said chamber summons was heard at length and by speaking order the said chamber summons was dismissed. While dismissing the said chamber summons, learned single Judge (Dharmadhikari,J) in

his order dated 7.7.04 has given clear finding that the plaintiff is not entitled to claim any liquidated damages in view of order passed by learned single Judge (Shah,J.) on 27.9.99 and he held that in view of the fact that the claim for liquidated damages is not sustainable. Consequently relief of appointment of the Court Receiver can non be granted . The learned single Judge in his Judgement has given following observations;

> "(7) It is contended that the plaintiff took a stand and rightly so that the permanent alternate accommodation as offered was not as per the consent terms and the plaintiff was not obliged,therefore, to take possession of the same.
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> (8) After making reference to the proceedings including Notice of Motion and earlier Chamber Summons, it is contended by Mr.Kapadia that in accordance with the consent terms, compensation at the rate of Rs.3000/- per day from 17/1/1997 to 14/10/1999 be awarded and therefore,

the Chamber Summons be made absolute.

(10) Alternatively, it is contended that Clause 8 of the consent terms is clear. Under that clause there is obligation to provide permanent alternate accommodation as per plan annexed to the said consent terms. He submits that it is not the case of the plaintiff that permanent alternate accommodation is not in accordance with the plan annexed to the consent terms. Inviting my attention to the Clause 21 of the consent terms, it is contended by Mr. Sanglikar that there is a default committed by the plaintiff in handing over vacant and peaceful possession of the premises in his use and occupation. In other words, upon defendants offering possession of the permanent alternate accommodation, the obligation under Clause 21 is that plaintiff should

hand over possession of the original premises within a period of 30 days and delay in doing so makes him liable for payment of Rs.3000/- per day as per this Clause. Mr.Sanglikar submits that by letter dated 10/10/1998 the plaintiff was offered possession of permanent alternate accommodation consequent upon BMC granting occupation certificate. It was pointed out in this letter that the permanent alternate accommodation was ready to the knowledge of plaintiff for a considerable length of time but the delay occurred on account of BMC not granting occupation certificate. For this delay, defendants are in no way responsible and consequently they can not be called upon to pay liquidated damages. Mr.Sanglikar submits that the plaintiff raked up, without any basis, the issue of occupation certificate in the name of a dead person and deliberately

delayed taking possession of the alternate accommodation. The Plaintiff's own conduct disentitles him from making any such claim.

(12) With the assistance of learned counsel for parties I have gone through the chamber summons, affidavit in support and its annexures. With their assistance I have perused the relevant clauses of consent terms. In my view, there is considerable substance in the contentions of Mr. Sanglikar. Without going into the issue of maintainability of Chamber Summons on the ground of absence of leave under Order XXI,Rule 22 of the Code of Civil Procedure, on merits, I find that there is no basis at all for the claim in the chamber summons.

(13) From perusal of the order passed by this Court on 27/9/99 in

the Notice of Motion taken out by the plaintiff, it is clear that by mistake part occupancy certificate was issued in the name of the deceased. This Court has recorded in the said order that parties have applied to the authority already for necessary corrections in the certificate. This court directed the authority to effect necessary correction in the certificate. The defendants undertook before this Court to comply with the conditions mentioned in the part occupancy certificate. At the request of plaintiff, period of handing over possession was extended by four weeks. Plaintiff was granted liberty to take possession of the suit premises after handing over possession of the existing premises to the defendants. In my view, this proceeding brought to an end to any issue/s that were outstanding. It has been the case of the plaintiff

that the consent terms obliged obtaining part occupancy/occupancy certificate and handing over possession of the premises. The location and area of the premises is not in dispute. Although, a complaint is made about electricity supply and water supply, it is clear from the perusal of the affidavit in support of the Chamber Summons that in March 1999 correspondence on this issue came to an end. There is no substance in the contentions of Mr. Kapadia that permanent alternate accommodation offered is not as per consent terms. That contention is raised only because part occupancy certificate was granted in the name of the deceased. As far as the alleged non provision of the amenities contemplated by the annexures to the consent terms, even that complaint or grievance came to an end the moment this Court passed an order on 27.9.99. In my view,

the present Chamber Summons does not raise any new ground nor does it furnish any cause of action for invoking Clause 8 of the Consent Terms. All complaints and grievances were redressed when the Notice of Motion was disposed off. Liberty granted to apply under order on the Notice of Motion cannot be construed as liberty to take out present Chamber Summons and raise self same grievance.

(14) In my view, once the defendants are not to be faulted for the delay in issuance of occupancy certificate and errors or discrepancies therein, then there is no substance in the complaint of the plaintiff of breach of obligations under the consent terms.Consequently, no question arises of payment of any liquidated damages as prayed in the Chamber Summons.''

After giving detailed findings as aforesaid

Chamber summons initiated by the plaintiff for appointment of Court Receiver was rejected.

16. THIRDLY by my order dated 12.4.05 I have also taken the similar view whilst allowing the chamber summons taken out by the plaintiff and relying upon the aforesaid two orders that claim for liquidated damages does not sustain in view of orders passed in the present proceedings. I allowed the chamber summons of the plaintiff and dismissed the execution application initiated by the defendants. In view of my own decision it is not permissible for me to take a contrary decision, when it comes to execution of a decree by plaintiff for liquidated damages.

17. FOURTHLY, even on merits I am of the clear opinion that clause 20 & 21 of the consent terms is composite scheme inter alia providing for reciprocal obligations. Under the said reciprocal obligations both the parties were at fault and there were delays in handing over the respective possession of the premises. By order dated 27.9.99 passed by learned single judge (Shah, J)the said issue has been finally put at rest by inter alia for providing in the order itself of simultaneous possession by both the parties

to each other. In view thereof these claims made by the parties for damages against each other is without merits and baseless. Learned counsel for plaintiff has however, vehemently contended that by aforesaid orders claim of plaintiff for liquidated damages is not given up, nor it has been determined. He further contended that order passed by learned single Judge(Shah,J) must be read so as to exonerate plaintiff alone from paying the damages and not the defendant. I am afraid it is not possible to accept the argument of learned counsel. Order of learned single Judge (Shah J) dated 27.9.99 took into account handing over possession by both the parties and not only by the defendant. Further more as held by learned single Judge (Dharmadhikari,J.) in view of the order dated 27.9.99 the disputes between the parties cannot survive any more and the liberty granted by the Division Bench can not be construed so as to give any right to the plaintiff to execute decree for liquidated damages. In my opinion both on the ground that the issue is finally settled by earlier orders as well as even on construction of consent terms I am of the opinion that it is not permissible for plaintiff to execute decree for liquidated damages. The clauses 20 and 21 of the

consent terms is composite scheme for simultaneously handing over possession of the premises to each other and provides for liquidated damages against each other. In the aforesaid circumstances I allow the present chamber summons and make the same absolute in terms of prayer clause (a). Consequently I also direct attachment dated 10/12/2004 levied on defendant movable and immovable properties stands **raised. However, there shall be no order as to costs.**

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